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WGE Federal Credit Union and Local 1, Office and Professional Employees International Union, AFL-CIO. Case 25-CA-29101

December 30, 2005

ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The administrative law judge's Decision and Order in this matter issued on August 10, 2005. He found certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act and recommended that Respondent take certain actions to remedy these alleged violations. Exceptions to the judge's decision were due on September 7, 2005. Respondent submitted its Exceptions and Brief in Support using the Board's e-filing procedures on its Web site on September 7 at 5:30 p.m. and 5:42 p.m. respectively. As these documents were filed after the 5:00 p.m. "official closing time" of the Board, the Board's Associate Executive Secretary, by letter dated September 8, 2005, rejected the filings as untimely.¹ On September 13, Respondent filed a "Motion to File Exceptions and Brief in Support Beyond the Time Prescribed in the Rules" based on the Board's "excusable neglect" provision. See Section 102.111(c) of the Board's Rules and Regulations.

Respondent's counsel asserts that, based on her experience with federal court e-filings, she incorrectly thought that she had until midnight on September 7, 2005 to timely e-file Respondent's exceptions (and brief). Shortly before 5 p.m. on that due date, Respondent's counsel states that she became aware that the Board's rules required that this filing occur by 5 p.m. When counsel spoke to the Board's Executive Secretary's Office about the looming deadline, counsel was told that she could seek an extension of time, but that there were no assurances that the request would be granted. Faced with this dilemma, counsel decided to try to complete and file the Respondents exceptions and brief by the 5 p.m. deadline. Counsel missed this deadline by about 30 minutes.

Concededly counsel for the Respondent was guilty of neglect. The Board rule was sent to her and she neglected to read it until the 11th hour. However, the issue

¹ Section 102.111(b) of the Board's Rules and Regulations, in part, requires receipt by the Board by the official closing time on the last day of the time limit for filing.

is whether the Board should, equitably, excuse this neglect. In these particular circumstances, we believe that we should. At the 11th hour, counsel was in a bind. If she sought an extension of time, she might not get it.² Thus she tried mightily, and in good faith, to complete the exceptions (and brief) in time. She missed the deadline by a matter of minutes and no one was prejudiced by the delay. We also note that, unlike the situation in *Carpenters (R.M. Shoemaker Co.)*, 332 NLRB 1340, 1341 (2000), cited by our dissenting colleague, the rule here is relatively new, distinguishable from, and more rigorous than, the practice in the federal courts. In these circumstances, we would not impose the harsh penalty of forfeiture on the Respondent. We also disagree with the dissent that our decision here somehow makes the Board's rules a "nullity." To the contrary, we seek to give meaning to our own rule which recognizes that neglect may be "excusable."

Based on the foregoing, Respondent's Motion to File Exceptions and Brief in Support Beyond the Time Prescribed in the Rules is granted. Accordingly, the exceptions and brief in support submitted by Respondent on September 7, 2005 have been transmitted to the Board for consideration. Pursuant to Section 102.111(c) of the Board's Rules and Regulations, briefs responding to the foregoing documents and/or cross-exceptions are due in Washington, D.C. by close of business of January 13, 2006.

Dated, Washington, D.C. December 30, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting:

I would deny the Respondent's motion, which is opposed by both the General Counsel and the Charging Party, because I see no basis for excusing the neglect of the Respondent's counsel.

The Board's rules are clear: Exceptions to an administrative law judge's decision, and any supporting brief, must be "received by the Board . . . before the official closing time [5:00 p.m.] . . . on the last day of the time limit." Board's Rules and Regulations, Section

² Section 102.111(b) of the rules specifies that such requests filed within 3 days of the document due date must be grounded on circumstances "not reasonably foreseeable in advance."

102.111(b). While the Board now permits parties to submit these documents electronically, the same deadline applies. The Board's "e-filing" procedures, found on the Board's Internet Web site, explicitly warn parties that:

E-FILINGS MUST BE TIMELY

Parties or other persons using the Board's E-Filing Form provided in this Web site are cautioned not to rely on E-Filing for "last minute" requests E-Filings must comport with all applicable time requirements including Section 102.111(b).

This warning is hyper-linked to the Board's rule.

Here, Respondent's counsel engaged in precisely the sort of last-minute behavior that litigants are warned against. Simply assuming that the Board's rules were the same as those of the federal courts with which she was familiar, she failed to read the Board's time requirements until *90 minutes* before the exceptions and brief in this case were due to be received by the Board. At that point, e-filing was the only option—but the exceptions and brief were still not complete, and they proved impossible to finish by the deadline. Nor was an extension of time available. When extension requests are filed within three days of the due date, they "must be grounded upon circumstances not reasonably foreseeable in advance." Section 102.111(b).

True, Respondent's counsel found herself in a difficult position. But it was of her own making. She was charged with knowing the Board's rules and procedures, those rules and procedures were clear, and no factors outside of her control impeded her from complying with them. Indeed, the Respondent acknowledges that "counsel for the respondent may have been culpable, may have

been careless, may even have had some control over the circumstances."¹ Yet the Respondent fails to point to any substantial reason for excusing the neglect of its counsel. That the e-filing system is relatively new and that counsel did not willfully disobey the Board's rules are beside the point.

In similar circumstances, the Board has not hesitated in rejecting late filings. See, e.g., *Carpenters (R.M. Shoemaker Co.)*, 332 NLRB 1340, 1341 (2000). As we have observed, "[i]f the Board were to excuse a failure to ascertain the requirements of applicable rules, then the rules would become a nullity." *Bartlett Nuclear*, 314 NLRB 1, 1 fn. 1 (1994), citing *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984). Accord *Carlisle v. U.S.*, 517 U.S. 416, 430 (1996).

When the Board issued Section 102.111(b) in 1986—in response to sharp judicial criticism of the Board's ad hoc approach to late filings—it sought to usher in a new era of consistent enforcement of clear filing deadlines. See *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426, 427 (2002). The introduction of e-filing, an innovation designed to aid litigants, is no reason to retreat from that approach.

Dated, Washington, D.C. December 30, 2005

Wilma B. Liebman,

Member

NATIONAL LABOR RELATIONS BOARD

¹ Supplemental Brief in Support of Motion to File Exceptions and Brief beyond the Time Prescribed in the Rules at p. 7.